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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33466

BOROUGH OF RIVERDALE – PETITION FOR DECLARATORY ORDER –
THE NEW YORK SUSQUEHANNA AND WESTERN RAILWAY CORPORATION

Decided: February 23, 2001

The Borough of Riverdale (the Borough), a New Jersey municipality, filed a petition for declaratory order in this proceeding.[1] The Borough sought a determination regarding the extent to which certain facilities constructed and operated in Riverdale by The New York, Susquehanna and Western Railway Company (NYSW) are covered by the Federal preemption provisions contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995 (ICCTA).[2]

In our decision instituting this proceeding on September 10, 1999 (1999 Decision), we expressed our general views on the preemption issues raised, to the extent the record permitted,

[1] The background of the controversy that led to the petition for a declaratory order is set out in our prior decision, and there is no need to repeat it here.

[2] 49 U.S.C. 10501(b) now provides:

> The jurisdiction of the Board over—
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> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
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> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

based primarily on the interpretation by the courts of the statutory preemption provision.[3] We pointed out that, under this broad preemption regime, state and local regulation[4] cannot be used to interfere with interstate railroad operations. We expressed the view that state and local permitting or pre-clearance requirements are preempted because by their nature they interfere with interstate commerce, but that non-discriminatory enforcement of other types of state and local requirements, such as building and electrical codes, generally would not be preempted. Thus, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce.

Accordingly, we permitted the Borough, NYSW, and other interested persons to submit further information and comments about the operation of NYSW's facility in the Borough and about any other unresolved general preemption issues as to which parties believed the Board should provide clarification. In addition to responses from the Borough and NYSW, we received seven other comments.[5] The material provided by the Borough and NYSW indicates that those parties have settled all of their differences about the dispute that prompted this proceeding, i.e., application of municipal regulations to NYSW's Riverdale facility. Consequently, there is no longer any basis for us to review that situation. None of the other comments expressed disagreement with our analysis of the general parameters of the statutory provision,[6] or with the need to resolve specific preemption issues on a fact-specific basis.

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[3] Many of the preemption decisions have been issued by the courts, rather than the Board, because the controversies have tended to arise in the context of proceedings that are outside of the Board's regulatory jurisdiction.

[4] As we have explained, section 10501(b) does not preempt valid safety regulation under the Federal Rail Safety Act, 49 U.S.C. 20101 et seq. See Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control, and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1, 63 FR 72,225 (Dec. 31, 1998).

[5] Those comments were filed by: the Borough of Bogata, NJ; a group of seven other municipalities (Auburn, WA; Bay Village, Rocky River, and Sandusky, OH; Lee's Summit, MO; Olathe, KS; and Rochester, MN); the Association of American Railroads; the American Short Line & Regional Railroad Association; the Hackensack Meadowlands Development Commission; former Congressman Robert A. Roe; and Congressman Stephen R. Rothman.

[6] While some parties complain about the breadth of the statute, they do not offer specific examples of how we can interpret the statute differently, given the existing case law.

In these circumstances, we will now terminate this proceeding. In so doing, we reaffirm the views we expressed in the 1999 Decision and summarize additional agency and court precedent that may provide guidance in resolving preemption issues in other contexts.

1. New Court Rulings.

In the 1999 Decision, we noted that courts have found that the broad statutory preemption applies even in instances — such as the construction of yards or ancillary facilities, or the upgrading of existing track — in which the Board lacks licensing and conditioning authority. We pointed out that railroads can nevertheless be required to observe generally applicable, nondiscriminatory local fire, health, safety, and construction regulations that do not restrict the railroad from conducting its operations or unreasonably burden interstate commerce. In Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000), the court similarly recognized Congress' intent in the ICCTA to preempt local permitting requirements with respect to railroad operations, but it found that the railroad would have to comply with local codes for electrical, building, fire, and plumbing when building a refueling facility, unless the codes restrict the railroad from conducting its operations or unreasonably burden interstate commerce.

In Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000), the court found that section 10501(b) preempted local zoning regulations and precluded the state court from adjudicating common law nuisance claims involving noise and air pollution from a railroad maintenance facility. The court further found that, while the locality could not require permits prior to construction, the railroad must notify the local government "when it is undertaking an activity for which another entity would require a permit." The court determined that, generally, localities may enforce their local fire, health, plumbing, safety, and construction regulations and that the railroad may not deny the local government access for reasonable inspection of its maintenance facility. Moreover, the court concluded that the railroad could be required to furnish its site plan to the local government.

Another court found that section 10501(b) precludes condemnation under state law of passing track that is integral to operating the railroad's single-track line. Wisconsin Central Ltd. v. City of Marshfield, No. 99-C-0636-S (W.D. Wis. Feb. 10, 2000), 2000 U.S. Dist. LEXIS 10570. On the other hand, the court in Florida East Coast Ry. v. City of West Palm Beach, 110 F. Supp. 2d 1367 (S.D. Fla. 2000), determined that a city could apply its zoning and licensing regulations to a facility that, although owned by a railroad, is not used in rail transportation but rather by the railroad's lessee, a building materials company.

2. New Board Ruling.

The Board has dealt with one major preemption case since issuance of the 1999 Decision. In Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053 (STB served Dec. 1, 2000), we expressed our view that a town may seek court enforcement of two noise abatement agreements that the town had entered into with a railroad,

notwithstanding the broad sweep of the statutory preemption provisions. We explained that the railroad had voluntarily entered into the agreements, and thus the preemption provisions should not be used to shield the carrier from its own commitments. Rather, because "[t]hese voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce" (slip op. at 5), we declined to undercut them. The railroad involved in that proceeding subsequently filed a petition for clarification or reconsideration of our decision and has recently challenged the decision in court. Consolidated Rail Corporation v. Surface Transportation Board, No. 01-1042 (D.C. Cir. filed Jan. 25, 2001).

It is ordered:

1. This proceeding is terminated.

2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary